IN THE

Supreme Court of the United States

October Term, 1953

No. 43

SOUTHERN PACIFIC COMPANY, a corporation,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and R. E. MITTELSTAEDT, JUSTUS F. CRAEMER, HAROLD P. HULS, KENNETH POTTER and PETER E. MITCHELL, as members of and constituting said Commission,

Appellees.

Appeal From the Supreme Court of California.

Brief of City of Los Angeles and City of Glendale, Real Parties in Interest.

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Foreword.

The City of Los Angeles and City of Glendale, real parties in interest in the above-entitled cause, file this separate brief in reply to that portion of the joint brief for appellants filed in this case and in *The Atchison, Topeka and Santa Fe Railway Company v. Public Utilities Com-*

mission of the State of California and City of Los Angeles, No. 22, for the following reasons:

1. The factual situation in the two cases is entirely different. This case involves the elimination of an existing grade crossing whereas the *Santa Fe Railway Company Case No. 22* involves the enlargement of an existing inadequate grade separation.

2. The City of Glendale was the applicant who filed the petition for the order of the California Public Utilities Commission which gives rise to this appeal, and the City of Glendale and City of Los Angeles are real parties in interest in this case since each city is required to pay 12½% of the cost of the grade separation under the order of the Public Utilities Commission which is under question in this appeal.

Statement of the Case.

Due to the fact that the statement presented by the appellant, hereinafter referred to as Railroad, did not give a fair picture of the facts in this case, we point out the following information which is material to the question presented:

Throughout the proceedings below, the Railroad contended that public safety was not involved in the Los Feliz grade crossing, and that the Commission could not therefore allocate to it a share of the cost of constructing the grade separation which exceeded the benefits to the Railroad. The record of the evidence presented to the Public Utilities Commission of California is not before this Court, and the Railroad has referred only to evidence before the Commission which is most favorable to the Railroad's position. However, substantial evidence of a

public safety hazard at the grade crossing, and caused by the grade crossing, was presented to the Commission as well as evidence of an unreasonable obstruction of the crossing by the Railroad. [R. App. 89, 167-169]* The Commission found at the conclusion of the hearings that public safety as well as public convenience and necessity required the construction of the grade separation. [R. App. 32.]

In the petition for writ of review to the Supreme Court of California and briefs filed subsequent thereto, the Railroad has urged only the facts presented before the Commission most favorable to it. It has ignored, or contended that facts adverse to its position do not exist, or has incorrectly stated the facts. It would be impossible, without the record before the Commission, to clarify the factual situation which the Railroad has so ably confused.

The Railroad has made no contention that the construction of a grade separation is not needed. The question presented to the California Supreme Court related solely to the allocation of costs. That the issue was so limited in the court below by the Railroad was clearly and succinctly stated in its Memorandum of Points and Authorities in Support of Petition for Writ of Review to the Supreme Court of California, wherein Railroad stated [R. 14]:

> "It is important at the outset to note that petitioner did not, at any stage of the proceedings, and does

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*In the printed record, the appendix to the Petition for Writ of Review in the state court and all subsequent parts of the record were separately paged and numbered; references to pages in that appendix and subsequent parts of the record are therefore shown as "R. App. . . ." Emphasis supplied throughout this brief unless otherwise indicated.

not now oppose the construction of a grade separation at Los Feliz. On the contrary, petitioner has favored and supported that proposal."

Again, in the same memorandum of points and authorities Railroad said [R. 15]:

"Thus this petition is directed principally to the Commission's action in allocating to petitioner, as its contribution, an amount substantially exceeding and indeed having no relation to the actual benefits accruing to the petitioner, and to the Commission's failure and refusal to limit such allocation to the amount shown to represent the fair value of such benefits."

Questions Presented.

It appears that the questions presented are as follows:

1. Is an order of a public utilities commission allocating costs for construction of a grade separation structure made after notice and hearing subject to attack either on appeal or by certiorari in the absence of the record made before the commission and upon which it acted?

2. If a railroad is forced to pay a substantial part of the cost of constructing a grade separation structure in order to eliminate a safety hazard and to permit the free and presently necessary use of a street for purposes of travel, must there appear to be a corresponding benefit to the railroad in its operations substantially commensurate with the amount the railroad is forced to pay in order to avoid

(a) Taking the railroad's property for public use without just compensation in violation of the due process clause of the Fourteenth Amendment;

(b) Denying the railroad the equal protection of the law in violation of the Fourteenth Amendment;

(c) Imposing undue and unreasonable burdens upon interstate commerce in violation of the commerce clause contained in paragraph 3, Section 8, Article I of the Constitution of the United States or any paramount Federal statute?

Summary of Argument.

1. Since in a case of this nature the attack must be upon the order of the California Public Utilities Commission, the assignments of error on the part of the California Supreme Court in affirming the order do not present questions which may be decided on appeal from the judgment of that court, and the appeal should be dismissed. (*Live Oak Water Users Assoc. v. Railroad Commission* (1926), 269 U. S. 354, 357.) The order of the California Public Utilities Commission cannot be reviewed either on appeal or on certiorari because even if the order in its finality be considered as legislative-administrative in character, yet under the California constitutional provisions empowering the Commission to act, the ordained procedure by which this result is to be achieved is strictly judicial (*Pacific Tel. etc. Co. v. Eshleman* (1913), 166 Cal. 640, 650, 137 Pac. 1119, 1122), and the record made before the Commission upon which

the order involved in this case is based is not before this Court. If the Railroad is relying upon the face of the Public Utilities Commission order as showing impairment of the Railroad's constitutional rights, the order must be affirmed because there is nothing on the face of the order to furnish sufficient ground for determining that the allocation of costs is unreasonable and therefore void. The order shows on its face that the construction of the grade separation was required by the public safety, convenience and necessity, and such a finding was an adequate basis for assessing as much as the full cost of the grade separation on the Railroad. Furthermore, the validity of the order depends upon the facts of this particular case, and the record of the facts upon which the order involved in this case is based is not before this Court.

2. Even if the order of the Commission were considered properly before this Court on appeal, and the record before the Court were considered adequate, the order should be affirmed. If the order were considered a legislative act of the State of California, it would come before this Court on appeal with a presumption of validity. (See *Alaska Packers Assoc. v. Industrial Accident Commission* (1934), 294 U. S. 532, 543; *Borden Farm Products v. Baldwin* (1934), 293 U. S. 194, 209.) The findings of fact of the Commission that the public safety, convenience and necessity require the construction of the grade separation, would also be presumed to be correct. (See *Radice v. New York* (1923), 264 U. S. 292, 294-

295.) If the order as a legislative act would be considered valid only in the event that certain circumstances exist, it would be presumed that all such circumstances do exist. (See *Borden Farm Products v. Baldwin* (1934), 293 U. S. 194, 209.) If the question of what the facts establish be a fairly debatable one, this Court has held, in reviewing legislation, that it would not be permissible for the Court to set up its opinion in respect of the facts against the opinion of the lawmakers. (See *Radice v. New York* (1923), 264 U. S. 292, 294.)

In this particular case, the Public Utilities Commission of California, after hearing extensive evidence including substantial evidence that the existing grade crossing is hazardous and unreasonably interferes with the use of a public street by the public, found that the public safety, convenience and necessity require the construction of a grade separation. [R. App. 31-32.] In addition to the evidence received, the Commission was undoubtedly aware of the conditions at the grade crossing which had been before it for consideration on previous occasions. (Joint Br. for Appellants, 10.) The direct and indirect benefits to the Railroad arising from the construction of a grade separation structure were fully presented to the Commission and considered by it in reaching its decision. [R. App. 32-33.] The continuing obligation of the Railroad to assist financially in the construction of the grade separation was also considered. [R. App. 32.] After a consideration of all these factors, the Railroad was ordered to pay only 50% of the total cost. [R. App. 34.]

Under the recited circumstances, the order clearly constitutes a reasonable exercise of the police power.

The Railroad concedes that the decisions of this Court prior to 1935 held that railroad corporations could be required at their own expense not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways. However, the Railroad contends that the decision of this Court in the case of *Nashville C. & St. L. R. Co. v. Walter* (1935), 294 U. S. 405, reversed the previous decisions of this Court with respect to the allocation of costs of grade separations. But the *Nashville* case did nothing more than determine that it was improper for the Supreme Court of Tennessee to refuse to consider certain evidence in determining whether or not a statute requiring a 50% allocation of grade separation costs to a railroad was reasonable as applied to the particular grade separation involved in that proceeding. This Court did not decide that if, after considering such evidence the Supreme Court of Tennessee had sustained a 50% allocation as being reasonable, it would substitute its judgment for that of the Supreme Court of Tennessee.

Cases decided by several of the highest state courts since the *Nashville* case do not interpret the *Nashville* case as requiring the allocation of costs on the basis of benefits where the public safety, convenience and necessity require the construction of a grade separation, and allo-

cations have been affirmed which were not based solely upon benefits to a railroad. See *State of Mo. ex rel. Wabash R. Co. v. Public Service Commission* (1936), 340 Mo. 225, 100 S. W. 2d 522, 109 A. L. R. 754; *Lehigh & C. E. R. Co. v. Public Service Commission* (1937), 126 Pa. S. 568, 191 Atl. 380; *Chicago Junction Ry. Co. et al. v. Illinois Commerce Commission* (1952), 412 Ill. 579, 107 N. E. 2d 758.

The Railroad has contended that the Public Utilities Commission of California has followed the so-called benefit principle of allocating grade separation costs for 16 years. As applied to grade separations required by the public safety, convenience and necessity, their contention is unfounded. The Commission has considered benefits to the railroads when allocating costs for separations which in the opinion of the Commission it could not find were required by the public safety, convenience and necessity, but the Commission has never felt itself bound to allocate costs solely upon the basis of benefits in those cases where it could find that the public safety, convenience and necessity required the construction of a grade separation. The practice of the Commission comports with a reasonable exercise of the police power.

3. The order of the Public Utilities Commission is not subject to attack upon the ground that it offends against the commerce clause as it makes no discrimination against interstate commerce, will not impede its movement in regular course and will affect it only incidentally.

ARGUMENT.

A considerable portion of the argument in the Joint Brief for Appellants has no particular application to the facts relating to the construction of a grade separation at the Los Feliz crossing. Accordingly, those portions of appellants' argument are passed without comment in this brief. However, the absence of reply thereto is not to be taken as acquiescence therein or agreement therewith on the part of these interested parties.

Point I.

Upon the Record Presented in This Case, This Court May Not Review the Decision and Order of the California Public Utilities Commission Either on Appeal or Certiorari.

The jurisdictional problem presented in both the *Atchison, Topeka and Santa Fe Railway Company Case No. 22* and this case, is fully covered in the brief of appellee, City of Los Angeles, filed in the *Santa Fe* case. In order not to be repetitious, argument on that problem has been omitted from this brief, but the arguments contained therein on the jurisdictional problem are adopted and urged as though set forth in full in this brief.

Point II.

Even if the Order of the Commission Be Considered Properly Before This Court on Appeal, and the Record Be Considered Adequate, the Order Must Be Affirmed.

A. The Presumption of Validity.

If this Court is to consider this case upon the merits on the theory that the order of the Commission is a statute of the State, the basic principle which underlies the entire field of legal concepts pertaining to the validity of legislation is that by enactment of legislation, a constitutional measure is presumed to be created. In every case where a question is raised as to the constitutionality of an act, the court employs this doctrine in scrutinizing the terms of the law. (*Alaska Packers Assoc. v. Industrial Accident Commission* (1934), 294 U. S. 532, 543; *Borden Farm Products v. Baldwin* (1934), 293 U. S. 194, 209.) If an act of the legislature would be valid only in the event certain circumstances exist, it will be presumed that all such circumstances do exist. Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislative body, the general rule is that courts will acquiesce in the legislative decision unless it is clearly erroneous, arbitrary, or wholly unfounded. (*Radice v. New York* (1923), 264 U. S. 292, 294-295; *Borden Farm Products v. Baldwin, supra.*)

Whenever the determination by the legislature is in reference to open or debatable questions concerning which

there is a reasonable ground for difference of opinion, and there is probably basis for sustaining the conclusion reached, its findings are not subject to judicial review. In *Radice v. New York, supra,* Mr. Justice Sutherland, speaking for this Court, said (p. 294):

> "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker."

See also *Gant v. Oklahoma City* (1932), 289 U. S. 98.

In the case of *Laurel Hill Cemetery v. San Francisco* (1910), 216 U. S. 358, this Court reviewed an ordinance of the City of San Francisco forbidding burial of the dead within the city and county limits. Mr. Justice Holmes, speaking for the Court, said (p. 365):

> "If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief. Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded (citing cases)."

The order of the California Public Utilities Commission which is challenged in this proceeding contains the following finding:

> ". . . we hereby find it to be in the interest of public *safety*, convenience and necessity, . . . to require the construction of a grade separation . . ." [R. App. 32.]

Under the foregoing rules of construction, the order of the Public Utilities Commission is presumed to be valid and the findings of the Commission are presumed to be correct. The presumptions continue in effect until overcome by evidence to the contrary. In this case the findings of fact were supported by substantial evidence considered by the Commission in reaching its decision, but the record needed to review the findings is not before this Court.

B. The Reasonableness of the Order.

Such record as is before this Court discloses that the challenged order of the California Public Utilities Commission was based on a consideration of:

1. Evidence that the public safety, convenience and necessity required the grade separation.

2. The direct and indirect benefits to the Railroad resulting from the construction of a grade separation.

3. The legal obligation of the Railroad to contribute toward the cost of construction of a grade separation.

1. EVIDENCE THAT THE PUBLIC SAFETY, CONVENIENCE AND NECESSITY REQUIRED THE GRADE SEPARATION.

Although the record before the Commission is not before this Court, much of the evidence before the Commission is referred to in the briefs which are a part of the printed record on appeal before this Court.

The existing grade crossing has been the scene of many accidents. [R. App. 89.] Fortunately, the accidents to date have not been particularly serious. This is due in part to the fact that crossing gates are maintained day and night and all vehicular and pedestrian traffic is stopped at the approach of trains. [R. App. 201.] However, this method of protecting the grade crossing is creating other hazardous conditions because of the great volume of local traffic now necessarily using Los Feliz. The stopping of this traffic for the length of time necessary for a long freight train to clear the grade crossing results in "backlashing"; that is, delayed traffic collects and backs over San Fernando Road and other streets. [R. App. 202.] For example, vehicles caught in the "backlash" become completely blocked in the intersection of San Fernando Road and Los Feliz, an intersection approximately 800 feet east of the grade crossing. Unable to go either forward or backward, these vehicles are helplessly trapped in a very hazardous situation, with heavy traffic including many large trucks approaching such trapped cars at substantial speeds from both directions on San Fernando Road. [R. App. 202.]

"Backlash" now occasionally occurs on the railroad during peak hours. [R. App. 202.] The "backlash" occurs when traffic which has been collected by the closing

of the crossing gates is released. The released traffic is in such large volume that it is unable to clear traffic-controlled intersections nearby, with the result that vehicles are stopped on the railroad tracks, unable to move forward or backward, and the gateman is unable to lower the crossing gates when this situation occurs. As traffic flow on Los Feliz increases in the future, "backlash" will become a common occurrence. [R. App. 202.] Traffic volume has increased from 16,000 vehicles per day in 1923, to 27,000 vehicles per day in 1951 [R. App. 202], and traffic volume is expected to increase further. The standing of vehicles on a grade crossing, as a result of "backlash" of vehicles unable to move forward or backward, presents an obviously hazardous situation and such a situation may be expected to become a common occurrence in the future. [R. App. 202.] The Public Utilities Commission commented briefly on the congestion at the grade crossing in its decision. [R. App. 25.]

The Railroad has gradually increased its obstruction of the Los Feliz grade crossing, and has thus increased the inconvenience to and interference with the general public who use this crossing. The number of freight movements has increased materially since 1936. [R. App. 202.] On August 7 and 8, 1936, at another grade crossing which is approximately one-half mile from the Los Feliz crossing on the same main line tracks, there were 24 or 25 movements counted per day *inclusive* of any switching operations [R. App. 202], while at the Los Feliz grade crossing on Sunday, June 17, 1951, there were 54 train movements (*exclusive* of nine switching movements); on Monday, June 18, 1951, there were 60 train movements (*exclusive* of 16 switching movements); and

on Wednesday, June 20, 1951, there were 59 train movements (*exclusive* of 13 switching movements). [R. App. 202.] It is therefore apparent that the number of freight and passenger trains has increased from not more than 24 or 25 per day in 1936 to 58 or 60 per day in 1951, an increase of approximately 140%. The Railroad contended that the two crossings were not comparable [R. App. 251-252], but the exhibits presented to the Commission show clearly that the same through trains pass both grade crossings and the figures referred to above understate rather than overstate the increase in the number of trains.

During the period of service of the Superintendent of Railroad for its Los Angeles Division, train lengths increased from 35 car trains when he was a brakeman, to present-day 90 to 100 car trains, which are quite common. [R. App. 203.] The same witness testified that during the past 25 years train lengths have increased from 75-80 car trains to 90-100 car trains [R. App. 203], or at least 20%. The increased number of train movements and the increase in the length of trains operated obviously have increased the inconvenience to, obstruction of, and interference with that portion of the public using the Los Feliz crossing.

Although the crossing has been the scene of ten crossing accidents in the ten-year period 1942 through 1951 [R. App. 89], the Commission was not obligated to consider the crossing safe merely because the accident record in the past was not serious. The words of Mr. Justice Holmes in the case of *Erie R. Co. v. Board of Public Utility Commissioners* (1920), 254 U. S. 394, are characteristically pertinent and concise (p. 412):

> "If we could see that the evidence plainly did not warrant a finding that the particular crossings were

dangerous, there might be room for the argument that the order was so unreasonable as to be void. The number of accidents shown was small, and if we went upon that alone we well might hesitate. *But the situation is one that always is dangerous.* The board must be supposed to have known the locality, and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state and county have confirmed its judgment. *The tribunals were not bound to await a collision that might cost the road a sum comparable to the cost of the change.*"

The present condition of the grade crossing presents an intolerable situation, both from a safety and a delay factor. Even assuming that the operation of crossing gates, with no regard to the delay caused to vehicular and pedestrian traffic, renders the grade crossing itself relatively safe, this does not eliminate the hazard caused by the grade crossing. As has been shown, this merely transfers the main point of hazard from the grade crossing itself to other intersections and causes the grade crossing to become hazardous immediately after passage of a train due to the "backlash" condition which is created thereon. But it is the grade crossing, which causes such hazards. In the absence of the grade crossing, the traffic would flow over the city streets and over the crossing without the hazards that are now present due to the crossing. The Railroad has contended that public convenience is not a sufficient basis for allocating to it a portion of the cost of making a grade crossing safe if such allocation exceeds the benefits to the Railroad from the construction of the grade crossing. The Railroad in effect argues that the hazard of the existing grade crossing could be removed

without the necessity of constructing a grade separation by merely closing the public street and that it may close the street to the great inconvenience of the public without any obligation to help in financing the elimination of the obstruction which it has created. The Railroad at more or less frequent intervals does now close or obstruct the street, with the resulting chaotic interruption of vehicular and pedestrian traffic. The expedient of temporarily closing a public street in order to make a grade crossing safe may be resorted to only when to do so does not cause excessive public inconvenience and delay. When the public inconvenience is caused by the Railroad unreasonably blocking the street, then certainly the Railroad can be required to pay a portion of the cost of the grade separation which exceeds its benefits. If this were not the case, the Railroad could in effect close off, and deprive the public of, the public street without any obligation to aid in keeping it open for use by the public.

2. THE DIRECT AND INDIRECT BENEFITS TO THE RAILROAD RESULTING FROM CONSTRUCTION OF A GRADE SEPARATION.

The Railroad has admitted very limited direct benefits from the construction of the grade separation. Its witnesses presented evidence to indicate that it could contribute the sum of $118,340 [R. App. 30] toward the cost of the grade separation, which it would recover over the life of the project in reduced expenses; in other words, the Company could contribute the $118,340 without really being out of pocket any money. In calculating the $118,340 the Railroad officials omitted many items which could properly have been included.

There are many other benefits, direct and indirect, to the Railroad from the construction of a grade separation. The Railroad has disputed all of these, as apparently railroads have in many cases throughout the country. In attempting to administer the so-called benefits theory under the Federal Aid Highway Act, similar disputes arose between railroads and state highway departments. General Administrative Memorandum 325 of the United States Bureau of Public Roads, issued in 1948 in connection with the Federal Aid Highway Act, contains the following statement and finding [R. App. 194, 195]:

> "Experience has demonstrated that it is impossible to measure benefits satisfactorily for individual railway-highway projects."
>
> [Finding] "2. That experience under the Act has demonstrated that many of the elements of the railroads benefits are so vague and difficult of evaluation, are so intangible or speculative, and are the subject of such divergence of views on the part of railways and the State highway departments that it generally has been and is impossible for them to arrive at a mutually acceptable basis for negotiating the agreement required of them for undertaking individual railway-highway projects. This has resulted in prolonged and futile negotiations in an effort to arrive at a basis of agreement and has defeated the undertaking of many urgently needed projects."

At the hearings before the Public Utilities Commission, evidence as to the following benefits was submitted to and considered by the Commission:

> (a) The benefit from being able to operate longer trains without unreasonable obstruction of grade crossings. [R. App. 198.]

(b) The benefit from being able to use tracks for storage purposes without unreasonable obstruction of grade crossings. [R. App. 198.]

(c) The benefit from the improvement of a street which is used as a feeder for the Railroad. [R. App. 199.] Thousands of the Railroad's patrons reach the Company's passenger station over the Los Feliz grade crossing, and upon construction of the grade separation those patrons will be able to reach the station without the inconvenience and delay now occasioned by delay at the grade crossing. [R. App. 199.]

(d) The benefit from the elimination of grade crossing accidents. While the accident experience at the Los Feliz crossing in recent years indicates an average annual cost to the Railroad of only $475 per year, one serious accident could involve a substantial amount of damage to Railroad property. [R. App. 200.] It is obvious that one accident might involve the Railroad in large claims for injuries to persons or property. The estimate of future damage claims based upon experience of the past ten years is inadequate and purely speculative, considering the increase in hazards which will develop as traffic volume on Los Feliz increases. As such traffic increases, "backlash", with vehicles stalled on the railroad tracks unable to move forward or backward, will become a common occurrence [R. App. 169.] From a safety standpoint a grade separation is of great benefit to the Railroad, and the benefit will grow greater every year.

(e) The benefit from improved good will. Many members of the public are antogonized against the Railroad by the unreasonable delay which now occurs at the grade crossing. [R. App. 200.]

(f) The benefit from improved drainage at the grade crossing. With the construction of the grade separation, water which now flows in the track area will be collected and disposed of without flowing over the tracks. [R. App. 201.]

3. THE LEGAL OBLIGATION OF THE RAILROAD TO CONTRIBUTE TOWARD THE COST OF CONSTRUCTION OF A GRADE SEPARATION.

The Railroad has a legal obligation to participate in constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation has been thoroughly set forth in many cases in other states, and in California by the Public Utilities Commission's Decision No. 25069 of August 15, 1932, reported in 37 C. R. C. 784, 786, 787:

> "The matter of direct financial benefits is not the sole test in the determination of the respective portions which the railroad and public should contribute toward the cost of such improvement. In apportioning the cost of constructing the separations between applicant and railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived. It should be recognized that the railroad has a continual obligation to participate in the matter of constructing and maintaining reasonable and adequate crossings over its tracks, both at grade and at separated grades. This obligation is inherent, notwithstanding the fact that the traffic on the railroad may increase or decrease."

In the decision involved in the *Santa Fe Railway Company Case No. 22*, the Commission affirmed its previous decisions that the Railroads have a continuing obligation to participate in the cost of constructing grade separations. (51 Cal. P. U. C. Reports 771, 782.) In the order involved in this appeal, the Commission affirmed its holding in the order involved in the *Santa Fe Railway Company Case No. 22.* [R. App. 32.]

With the California Public Utilities Commission having considered all of the foregoing facts and having allocated to the Railroad an assessment of only 50% of the cost of constructing the grade separation at Los Feliz, it is difficult to perceive upon what basis it can be contended that the order of the Public Utilities Commission constitutes an unreasonable exercise of the police power.

C. The Decisions Supporting the Order.

1. The Older Cases.

The Railroad concedes (Joint Br. for Appellants, 23) that until 1935 the decisions of this Court supported the principle that the state and its duly authorized political subdivisions had full power and authority to require railroad corporations, at their own expense, not only to abolish existing grade crossings but also to build and maintain suitable bridges or viaducts to carry highways newly laid out over their tracks, or to carry their tracks over such highways. The compelling reasons advanced by this Court in announcing its decisions in support of the principle have not changed materially, as an examination of the decisions will disclose. (*Erie R. Co. v. Board of Public Utility Commissioners* (1920), 254 U. S. 394;

Chicago, M. & St. P. Ry. Co. v. Minneapolis (1914), 232 U. S. 430; *Missouri Pacific Ry. Co. v. Omaha* (1914), 235 U. S. 121, and *Lehigh Valley R. Co. v. Board of Commissioners* (1928), 278 U. S. 24.)

2. The Nashville Case.

Due to the great stress that the Railroad places on the case of *Nashville C. & St. L. R. Co. v. Walters* (1935), 294 U. S. 405, it is desirable that the decision be closely examined. When that is done, it will be clearly indicated that the *Nashville* case supports the order which has been challenged on this appeal. In considering that case, the following points should be noted:

One:

The Tennesee statute there involved did not confer any discretion upon the Commission, but instead required the railroad in every case to pay one-half of the cost of a grade separation. (294 U. S. 412.) Here our statute gives to the Commission discretion to allocate the costs and does not purport to make an arbitrary assessment against the railroads.

Two:

In the *Nashville* case, the railroad conceded (294 U. S. 413)

> "that in Tennessee, as elsewhere, the rule has long been settled that, ordinarily, the State may, under its police power, impose upon a railroad the whole cost of eliminating a grade crossing, or such part thereof, as it deems appropriate."

The claim of unconstitutionality in that case rests wholly upon the special facts shown. Therefore the question as to what portion of the cost should be borne by a railroad in a grade separation such as we are concerned with in this proceeding was not even an issue in the *Nashville* case. The railroad conceded that in such a case as the one involved in this appeal it could be required to pay the entire cost!

Three:

The only point decided by this Court in the *Nashville* case was that the Supreme Court of Tennessee erred when it refused to consider the special facts in that case. And all this Court did was to remand the case to the Tennessee Court for consideration of those special facts. This Court did not purport to determine that even under the special facts there involved it was unconstitutional to assess one-half of the cost against the railroad. Instead it expressly stated that it was not making such a determination which was, in the first instance, for determination by the Tennessee Court. (P. 433.)

Included in the evidence and the findings of the trial court which the Supreme Court of Tennessee refused to consider were:

(a) that the underpass was part of a state-wide and nation-wide plan to foster commerce by motor vehicle on the public highways;

(b) that the decision to build the underpass, its location and construction, was not in any proper sense an exercise of the police power, but rather, as set forth in the bill of complaint, pursuant to a general plan of internal improvement fostered by the Congress of the United

States in conjunction with the several states to make a nation-wide system of super-highways in the interest of interstate commerce by motor vehicle, much of which is in active competition with the railroads themselves;

(c) that the underpass did not involve an exercise of the police power any more than many other features of this project, such as elimination of curves, grades, widening the pavement, *et cetera;*

(d) that the State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highway legislation. The aim of that legislation is a "connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation, no less important to the country as a whole than that offered by the railroads"; to establish "lines of motor traffic in interstate commerce." The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails;

(e) that relief of the unemployment incident to the business depression had been the main incentive for highway construction during the period in which the highway there in question was undertaken and completed;

(f) that Lexington, the city there involved, was a rural community of 1823 inhabitants located in a sparsely settled territory. *The construction of the new highway with the underpass was not designed to meet local transportation needs.* It was undertaken to serve as a link in a nation-wide system of highways. State Highway No. 20, as formerly routed, passed through Lexington on Clifton

Street, and crossed the railroad at grade; it was adequate for the existing traffic and that to be expected;

(g) that present facilities were deemed locally both safe and adequate which was attested by the fact that neither the city authorities, nor anyone else, had suggested elimination of that grade crossing; that the grade crossing was to remain unchanged after the new highway was put into use; and that the Clifton Street route continued to be used for the local traffic;

(h) that the underpass was required for a new and additional highway over which State Highway No. 20 was being rerouted, which was to become a part of a Federal-aid route between Nashville and Memphis;

(i) that the underpass was prescribed, *not upon consideration of local safety needs,* but in conformity to general plans of the Federal and State highway engineers, as being a proper engineering feature in the construction of a nation-wide system of highways for high speed motor vehicle transportation; and because it was the policy of the Federal authorities to make the avoidance of grade crossings a condition of a grant in aid of construction. *The requirement of the underpass, and the payment by the Railway under the 1921 Tennessee Act of one-half the cost of separating the grades, were results of the Federal-aid legislation. Final payment of Federal aid on this project was conditioned upon commencement of the construction of this underpass.* (Pp. 416-425.)

In other words, the underpass there involved was constructed in order to qualify for Federal funds, not to meet local traffic needs.

It is obvious that the *Nashville* case is unique and no authority for the contention that the law has now been changed so that railroads cannot be required to pay the cost of eliminating a grade crossing.

As was stated by this Court in the *Nashville* case (p. 431):

> ". . . No case involving like conditions has been found in any of the lower Federal courts; nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any State."

This makes it abundantly clear that this Court did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' responsibility in connection with grade separations.

The elimination of a grade crossing when required, not for the purpose of local transportation needs or public safety, but for the purpose of qualifying for Federal aid (as was the situation in the *Nashville* case), is clearly distinguishable from the grade separation involved in the instant proceeding. In the *Nashville* case we had a grade crossing in a community of 1823 people in a sparsely settled area; here we have a grade crossing in a metropolitan area populated by several million persons. In the *Nashville* case we had the new interstate highway created, leaving untouched the existing grade crossing. In the instant proceeding we have a situation where local transportation needs require the improvement. No new route is being established. The existing grade crossing is being eliminated to remove a dangerous condition, such

elimination being necessary in order that the street may safely handle local transportation needs.

It should also be emphasized that the Court expressly stated, in the *Nashville* case, at pages 432-433:

> "We have no occasion to consider now whether the facts presented by the Railway were of such persuasiveness as to have required the State court to hold that the statute and order complained of are arbitrary and unreasonable. That determination should, in the first instance, be made by the Supreme Court of the State. (Citing cases.) Moreover, since that court held the facts relied upon to be without legal significance, it did not enquire whether the findings were adequately supported by the evidence introduced in the trial court. The correctness of some of the findings is controverted by the State. Other facts of importance bearing upon the issue may possibly be deducible from the evidence, or be within the judicial knowledge of that court. When the scope of the police power is in question the special knowledge of local conditions possessed by the State tribunals may be of great weight. (Citing cases.) . . ."

We submit that the *Nashville* case, when properly analyzed, clearly supports the proposition that, in connection with a grade separation such as we are here considering, the Railroad can be required to pay the entire cost of the improvement, or such lesser amount as the Commission may deem proper.

Trucks and buses passing over the grade crossing involved in this appeal constitute a very small percentage of the total vehicular traffic using the crossing. [R. App. 168.] Local transit buses account for most of the buses and no certified carrier other than the two local transit

companies operate over the crossing. [R. App. 168.] Trucks that pass over are principally engaged in delivery services and other services pertaining to a neighborhood. [R. App. 168.] Testimony to the foregoing effect was uncontradicted. In the case of the Los Feliz grade crossing, we find that it is used by few if any vehicles in competition with the railroad, while it is used by a large number of vehicles carrying thousands of passengers to and from the Glendale station of Railroad. [R. App. 168.] The ever increasing volume of traffic at the crossing has been caused by the growth of the Los Angeles metropolitan area. [R. App. 190.]

3. Recent Cases.

There have been several cases decided since the *Nashville* case which have rejected the so-called benefit principle of allocating grade separation costs. These decisions indicate that the state courts involved did not interpret the *Nashville* case as reversing all of the previous decisions of this Court.

In *State of Missouri ex rel. Wabash R. Co. v. Public Service Comm.* (1936), 340 Mo. 225, 100 S. W. 2d 522, 109 A. L. R. 754, where the Public Service Commission of the State of Missouri assessed against the railroad 40% of the cost of an elaborate grade separation *through a public park*, the Supreme Court of Missouri, in sustaining this order, said (100 S. W. 2d 527):

> "The Wabash argues strenuously that the separation of the grade was made primarily for the convenience and benefit of the traffic on the highways and that the percent of cost of the improvement assessed against the railroads was grossly out of proportion to benefits received by them . . . It is

evident from the findings of the Commission, which were amply supported by the evidence, that due to crossing gates maintained by the Wabash the crossing was not very dangerous. The heavy traffic on the highway was compelled to stop for passing trains. This caused considerable delay, inconvenience, and so-called troublesome traffic jams, and materially interfered with the free use of the highway. By the law of necessity all traffic on a highway must give railroad trains the right of way . . . This is not such a case, but suppose a crossing was considered entirely safe because gates and watchmen were maintained by the railroad company, and let us further suppose that due to the number of trains passing over the crossing it materially interfered with the heavy traffic over a highway, would it be unlawful in such a case to assess a part of the cost of separating the grade crossing against the railroad? The separation in such a case would be for the benefit of the traffic upon the highway and not the railroad, yet the inconvenience created would be due entirely to the presence of the railroad. In such a case it certainly would not be unreasonable to assess against the railroad at least a part of the cost of restoring the usefulness of the highway. In the cases of *State ex rel. Alton Ry. Co. v. Public Service Commission,* 334 Mo. 985, 70 S. W. (2d) 52, and *State ex rel. Alton R. Co. v. Public Service Commission,* 334 Mo. 995, 70 S. W. (2d) 57, cited by the Wabash, structures separating grade crossings were in existence. These were found to be inadequate due to the increase in travel. The railroad was compelled to pay a part of the cost. Note what this court said in 70 S. W. (2d) 57, *loc. cit.* 60 (5-6): 'Elimination of danger of collision between vehicles and trains and benefit to the railroad be-

cause of that or other reasons is to be considered in proportioning costs, but these matters are not alone controlling. *Nor is benefit the fundamental consideration in proportioning expense. The true basis of apportionment of the cost has been declared by this court to be the extent to which the presence of the railroad at the place enhances the cost of a necessary improvement. State ex rel. Kansas City Terminal R. Co. v. Public Service Comm.*, 308 Mo. 359, 272 S. W. 957. If the presence of the railroad is the sole cause of an improvement necessary for the public safety, it may be required to pay the entire cost. *Chicago, Rock Island & Pacific Ry. Co. v. Public Service Comm.*, 315 Mo. 1108, 287 S. W. 617.' So in *State ex rel. M., K. & T. Ry. Co. v. Public Service Commission*, 271 Mo. 270, 197 S. W. 56, 59, court *en banc*, an existing subway was found inadequate and the major portion of the cost of enlarging the structure for the sole purpose of accommodating the travel upon the streets was assessed against the railroads. This court in the course of the opinion said: '. . . but the safety of passing trains is only one of the elements to be considered in matters of this kind. It is not the sole or controlling element. The convenience and necessities of the traveling public using Rollins Street must likewise be considered.' We see no distinction in principle between those cases and cases where the presence of a railroad renders a street inadequate to accommodate the traveling public."

In the case of *Lehigh & N. E. R. Co. v. Public Service Commission* (1937), 126 Pa. Super. 568, 191 Atl. 380, the Superior Court of Pennsylvania, in approving an order of the Public Service Commission of that state requiring the reconstruction of an old and inadequate un-

derpass and allocating the cost thereof among the state, the county and the railroad, said (191 Atl. 382):

> "The order of the commission was within its power and supported by the evidence, and is reasonable and in conformity with law.
>
> "Those conditions which may have brought about the necessity for a new underpass do not operate to relieve appellant. It is a question of providing for public safety by reasonable methods. The underpass built in 1911 may have been sufficient at that time; it is insufficient and perilous today. In order to prevent accidents and promote the safety of the public, the commission acted within its power, if the facts warranted, in ordering its reconstruction and in apportioning the cost thereof. Appellant's contention that it will receive no benefit from the proposed construction is not convincing. The question of benefits is not involved. 'It is the presence and ownership of the track involved, not any benefit conferred, which places liability on the railroad.' *Lehigh Valley R. R. Co. v. Public Service Comm.*, 105 Pa. Super. 423 at page 428, 161 A. 422 at page 424."

In the case of *Chicago Junction Ry. Co. et al. v. Illinois Commerce Commission* (1952), 412 Ill. 579, 107 N. E. 2d 758, the Supreme Court of Illinois, in sustaining an order of the Illinois Commerce Commission requiring the reconstruction of an old and inadequate underpass and allocating the cost thereof between the railroad and the city, said (107 N. E. 2d 762):

> "Appellants claim the apportionment is arbitrary because it assesses them for a public improvement from which they derive no benefits. This contention is without merit. As an adjunct to its right to regulate intersections of this type under the police power,

the commission also has the delegated authority to apportion the cost of repair or reconstruction when the same has been determined to be necessary. Illinois Central Railroad Co. v. Franklin County, 387 Ill. 301, 56 N. E. 2d 775; City of Chicago v. Commerce Comm. *ex rel.* Chicago and Western Indiana Railroad Co., 356 Ill. 501, 190 N. E. 896. Under the statute, the commission has the discretion to determine how the cost shall be apportioned, Chicago, Burlington & Quincy Railroad Co. v. Commerce Comm., 410 Ill. 60, 101 N. E. 2d 92, and we have held that this is a matter for the commission to determine from the evidence. Illinois Central Railroad Co. v. Franklin County, 387 Ill. 301, 56 N. E. 2d 775. If the evidence supports the apportionment order, as we believe it does here, lack of benefit to the party protesting it is not a controlling factor. In Chicago and Northwestern Railway Co. v. Commerce Comm., 326 Ill. 625, 628, 158 N. E. 376, 378, 55 A. L. R. 654, in answering the contention that the appellants advance here, we said: 'A railroad is a public utility deriving its franchise from the state, and, by accepting the same, agrees to submit to all burdens, conditions, and regulations imposed by the state with reference to its tracks and their intersections with highways necessary to promote or secure the safety of the traveling public.' And, further, 326 Ill. at page 629, 158 N. E. at page 379, 55 A. L. R. 654, 'The police power of the state is, however, in matters touching the public safety, a broad one, and, undoubtedly, for the promotion of public safety, railroad property may in a proper case be subjected to uncompensated obedience to police regulations * * * and the railroad company compelled to relocate its crossing of a highway and at its expense change from an overhead crossing to a subway when necessary to promote or preserve the

public safety.' In Nashville, Chattanooga & St. Louis Railway Co. v. Walters, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949, the United States Supreme Court even advanced the theory that apportionment of cost to a railroad might be valid though the improvement benefited commercial highway users who made no contribution toward its cost. Where the police power is the basis of such an assessment, benefit to the party assessed is not necessary for the validity of the decision governing the assessment."

4. Decisions of the California Public Utilities Commission.

If the Railroad is arguing that the order of the Commission violates some public policy of the State by reason of the method used by the Commission in allocating costs, such an argument does not present a Federal question. (*Endicott-Johnson Corp. v. Encyclopedia Press* (1924), 266 U. S. 285, 290.) However, we will review the decisions of the California Public Utilities Commission to show that there has been no deviation from established policy.

Prior to 1933, the Public Utilities Commission had never followed the so-called benefits theory in allocating grade separation costs. In two reported decisions in 1932 the Commission specifically rejected the so-called benefits theory. (See Decision No. 24782, *Application of City of San Bernardino* (May 23, 1932), 37 C. R. C. 506; Decision No. 25069, *Application of the City of Los Angeles* (Aug. 15, 1932), 37 C. R. C. 784.)

In 1933 the *Goshen Junction* case was decided by the Commission (38 C. R. C. 380). This is the decision which the Railroad contends changed the Commission's policy, but a reading of it discloses that the contention is

unfounded. The *Goshen Junction* case involved a new segment of a state highway which the Department of Public Works wanted to construct without grade crossings. The heaviest traveled grade crossing which was to be eliminated by the new grade separation was used by from 3,500 to 5,500 vehicles and from 12 to 20 trains per day. Vehicle delay due to trains amounted to 104 vehicle hours per year while delay to trucks and buses which were in competition with the railroad amounted to 871 vehicle hours per year in making safety stops. The Commission commented in the decision on the fact that the California Department of Public Works had the new highway program well planned and could finance it from state gas funds and from Federal Aid for construction. The Commission took cognizance of the then existing depression and consideration was expressly given to "the economic structure, particularly at this time when revenues from practically all sources are materially below what they have been in the immediate past." The decision recited that the railroad had contended that if the Department of Public Works insisted on building the grade separation "when it had not been shown that the economic benefits justified the substantial expense of a separation," the railroad's assessment should be limited to the direct benefits to the railroad. The Commission then said, "with this contention we do not agree." The Commission then decided that if the Department of Public Works elected to proceed with the construction *where according to the record there is some question as to its present economic justification*, the railroad should pay a sum reflecting both its direct and indirect benefits and the Department of Public Works should pay the balance.

If any rule was established in the *Goshen Junction* case, it was that when the facts were such that the Commission could not find that the public safety, convenience and necessity required a separation of grades, then it would not be proper to make the railroad pay more than a sum representing the direct and indirect benefits to the railroad from the separation. Such a rule comports with a reasonable exercise of the police power.

The Railroad contends that from the date of the *Goshen Junction* decision until 1949, the Commission followed the so-called benefits theory in allocating grade separation costs. (Joint Br. for Appellants, 65.) That is not a fact. In its Petition for Writ of Review to the Supreme Court of California, the Railroad listed all of the decisions of the Commission from 1933-1950. [R. App. 92-97.] A review of some of the listed decisions which are not included in the published reports of the Commission will demonstrate that the Railroad is not correct in its contention.

On May 1, 1933, five months after the *Goshen Junction* decision, the Commission rendered its Decision No. 25889. [R. App. 92.] That decision involved an application of the Department of Public Works for a separation of grades at McConnell Station, near Sacramento, California. The grade crossing which was to be eliminated by the grade separation was used by only 2,500 vehicles and ten trains per day and the annual vehicle delay amounted to only 661 hours. The Commission remarked in its decision that the record in the proceeding did not justify construction of the proposed separation at that time. However, the Commission stated that since the Department of Public Works had the finances available and was

desirous of effecting the grade separation, it did not believe that it should deny the Department the right to make the improvement. The decision included the following statement:

> ". . . in passing upon the question of apportionment of costs, we must give due consideration . . . to the railroad's direct and indirect benefits and other obligations."

The Commission then ordered the railroad to pay $15,000 toward the cost of a grade separation and permitted the Department of Public Works to construct the type of structure it wanted to build provided it pay the balance of the cost.

Decision No. 25667 [R. App. 95] rendered on February 27, 1933, and also after the *Goshen Junction* decision, arose out of an application of the Department of Public Works for a separation of grades at Oil Junction north of Bakersfield, and involved facts which did not furnish economic justification for a grade separation. The traffic over the grade crossing involved in that proceeding consisted of approximately 3,000 vehicles and 16 trains per day. The benefits theory was not discussed, but even though there was no economic justification for a grade separation, the railroad was assessed $12,000 of the total estimated cost of $90,000. The Commission stated that "it is reasonable to assume that the railroad should participate with the public in effecting improvements to eliminate grade crossing accidents."

Except for the decisions which have previously been referred to, not a single one of the decisions rendered between 1933 and 1949 discusses the formula used by the Commission in allocating the cost of grade separations.

The decisions approved a previously agreed upon allocation of costs in almost every case.

Almost all of the grade separation applications filed since 1933 have been filed by the Department of Public Works of the State of California. The applications involved either grade separations on state highways to be built with Federal Aid funds, or grade separations on city streets or county roads to be built with Federal funds. In fact, not a single grade separation built since 1933 has been found which was not built with Federal funds in whole or in part except two grade separations for which the railroad paid. The Federal funds were made available to construct these grade separations on the basis that the railroads' assessment be limited as prescribed by Congress and the Federal Bureau of Roads and such assessments were unrelated in any way to the benefits or the legal obligations of the railroads.

In several decisions, the Commission pointed out that the grade separations were being financed from Federal Aid funds. In Decision No. 40511 [R. App. 92] the Commission pointed out that the Department of Public Works was agreeable to paying the full cost of the grade separation if Federal Aid funds were available therefor, but that if such funds were not available the Department reserved the right to present evidence showing the proper allocation of costs. The Commission specifically ordered that if Federal funds were not available, additional consideration would be given by the Commission to the allocation of costs.

It is readily apparent from the foregoing decisions that there has been no adoption of the benefits theory by the Public Utilities Commission. The Commission has indicated that it will protect the railroads against being re-

quired to separate grades, when the public agencies desire to construct grade separations at points where the Commission cannot find that the public convenience and necessity require the grade separation. The Commission has indicated that in those cases it will limit the assessment to the railroads to an amount slightly in excess of the direct and indirect benefits to the railroads. When the public safety, convenience and welfare have required that a grade separation be constructed and there has been no payment of the cost from Federal funds, the Public Utilities Commission has consistently followed the practice of allocating the costs of grade separations after a consideration of the direct and indirect benefits and the obligations of the parties involved.

In the Joint Brief for Appellants, the Railroad calls this Court's attention to the fact that there are a very large number of grade crossings which should be eliminated by the construction of grade separations, and that when this is done the burden will be intolerable upon the Railroad. It should suffice to say that the plan for the separation of grades at many grade crossings has been under consideration for almost 30 years. The two grade crossings involved in this appeal and in the *Santa Fe Railway Company Case No. 22* are the first two grade separation improvements undertaken in California within the last 20 years without the aid of Federal funds which involve city streets not on the State Highway System. The construction of grade separations on state highways will probably continue to be financed primarily from Federal funds; and if the local agencies are no better off financially in the next 20 years than they have been in the last 20 years, there is little likelihood of any burden being cast upon the railroads.

Point III.

The Order of the Public Utilities Commission Is Not Repugnant to the Commerce Clause of the Constitution of the United States or Any Statute Enacted Under the Authority Thereof.

In order not to be repetitive, the argument on this point in the brief of the appellee City of Los Angeles in the *Santa Fe Railway Company Case No. 22*, is adopted and urged as if fully set forth in this brief.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the Supreme Court of California entered in this case should be affirmed or the appeal dismissed.

Respectfully submitted,

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